NO. 21737

In the

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

HONOLULU LUMBER CO., LTD., Appellant, vs. AMERICAN FACTORS, LTD., CITY HILL CO., LTD., HAWAII BUILDERS SUPPLY CO., LTD., ISLAND LUMBER CO., LTD., LEWERS & COOKE, LTD., MID PAC LUMBER CO., LTD., et al., Appellees.	NO. 21737

Appellant's Opening Brief

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Appellant's Opening Brief

STATEMENT OF JURISDICTION

This is an appeal from a final judgment in favor of the appellees rendered by the United States District Court for the District of Hawaii in an action by appellant under the anti-trust laws for treble damages and injunctive relief. (CT 388)1/ Jurisdiction was based upon the provisions of 15 U.S.C. Sections 15 and 26 commonly known as the Sherman and Clayton Acts. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. 1291 and 1294. Notice of appeal was filed within thirty days after entry of judgment on September 12, 1966 and after Order Denying Motion to Vacate Withdrawal of Counsel and Order Denying Motion to

1/ Parenthetic references preceded by "CT" are to the Clerk's Transcript of the record.

Vacate and Motion for Rehearing entered on September 27, 1966 (CT 418-423).

STATEMENT OF THE CASE

A. The Nature of the Controversy

This is an action under the federal anti-trust laws for damages and injunctive relief brought by appellant (sometimes referred herein as plaintiff) against the appellees (sometimes referred to herein as defendants). The Complaint was filed November 30, 1961 (CT 1-14). At this time Louis B. Blissard was plaintiff's local counsel of record. On November 4, 1964, Louis B. Blissard withdrew as plaintiff's local counsel and Messrs. Shim, Naito and Oki (Alvin T. Shim and Yukio Naito) appeared in his place (CT 260-261). On November 13, 1964 a First Amended Complaint (hereinafter referred to as Complaint) was filed (CT 269-283), and Answers were subsequently filed thereto by each of the defendants (CT 314-341).

The Complaint alleges that the plaintiff Honolulu Lumber Co., Ltd. was engaged as a wholesaler and distributor of lumber products in Oahu, Hawaii, and that each of the defendant corporations was likewise engaged as a wholesaler and distributor of building materials in competition with it. Beginning in about July, 1950, defendants and each of them entered into certain contracts and agreements which were intended to prevent and had the result of preventing plaintiff from obtaining supplies of lumber products and selling them in competition with the defendants, thereby

causing damages to plaintiff's business in the sum of $37,000.00 and estimated anticipated profits in the sum of $73,000.00, or a total of $110,000.00. The Complaint requested treble damages, in the sum of $330,000.00, and injunctive relief.

After conducting extensive pretrial discovery by written interrogatories, appellant on about June 10, 1966 requested a trial date (CT 368).

On June 17, 1966 appellees noticed the taking of the deposition of plaintiff's president, Preston Low, for June 28, 1966 in Honolulu (CT 351). On June 22, 1966, 6 days prior to the scheduled time for the deposition, plaintiff's local attorney Alvin Shim wrote a letter to defendants' attorneys requesting a three months' continuance of the deposition and also of the scheduled trial for the reason that the firm was withdrawing as attorneys in this action (CT 352). Each of the appellees' attorneys received this letter, but none of them responded to it although so requested (CT 351).

On about June 24, 1966 appellant's local counsel of record, Messrs. Shim, Naito and Oki obtained an ex parte order without written notice to it, without its consent and without just cause shown, contrary to the Federal Rules of Civil Procedure, permitting said attorneys to withdraw as such counsel. Upon learning of this withdrawal appellant endeavored without success to secure new local counsel and was still attempting to do so at the time the action was dismissed (CT 365-370).

The action was set for pretrial on September 6, 1966, and the Clerk of the District Court so advised appellant by letter dated June 27, 1966. There was no mention of a trial date (CT 459a). The Clerk in this letter also advised appellant to comply with Rule 1(e) of the local District Court rules requiring participation by local counsel in the action.

Appellant's president Preston Low did not appear for his deposition on June 28, 1966 at the scheduled time and place under the belief that it had been continued. He was willing to have his deposition taken at a later date, but he heard nothing further from appellees until receipt of notice of their Motion to Dismiss on about August 26, 1966 (CT 347-356).

Appellant wrote the Clerk of the District Court by letter dated August 24, 1966 stating that appellant had been attempting to secure the services of other local counsel but had been unable so far to do so, and requesting continuance of the pretrial conference from September 6, 1966 to October 7, 1966 (CT 465).

On August 26, 1966 the Clerk wrote appellant that its request for a continuance of a pretrial date was denied and that the pretrial would go on as scheduled. There was again no mention of a trial date nor of a hearing on September 2, 1966 on appellees' Motion to Dismiss filed the preceding day (CT 466).

Appellees filed a Motion to Dismiss on about August 25, 1966 pursuant to Rules 37(d) and 41(b) on the grounds that appellant had wilfully failed to appear for the taking of his duly noticed

deposition and that appellant's conduct in the action constituted a failure to prosecute. The hearing on the Motion to Dismiss was set for Friday, September 2, 1966, one court day prior to the date set for the pretrial conference, September 6, 1966 (CT 347-365). Appellant was under the mistaken belief that the hearing on the Motion to Dismiss would be held on the same date as that of the pretrial conference and accordingly filed no papers in opposition thereto until the following Tuesday, September the 6th (CT 377-380) Appellant's counsel wrote a letter to the Court dated September 2, 1966 again requesting that trial of the action be continued to the first week in November in order to afford appellant the further opportunity to secure the services of local counsel (CT 467-469). Appellant's counsel also sent a telegram to the Court from San Francisco on September 2, 1966 at 10:30 o'clock a.m. P.D.T. which presumably was received by the Court prior to the hearing on appellees' Motion to Dismiss at 2:30 p.m. that day H.S.T., stating that he would be unable to attend the pretrial conference the following Tuesday but was airmailing Plaintiff's Pretrial Statement, Memorandum and Affidavits (CT 466a).

Appellee prepared a pretrial statement and filed the same in time for the scheduled pretrial conference September 6, 1966 (CT 360-364).

Following entry of Order of Dismissal dismissing this action September 12, 1966 (CT 389) appellant first filed a Motion to Vacate Dismissal with Prejudice and Rehearing on Defendants'

Motion to Dismiss on about September 9, 1966 (CT 375-387) and subsequently on about September 23, 1966 filed a Motion to Vacate Withdrawal of Counsel and Reinstate Counsel of Record (CT 405-413) both of which Motions were denied by the Court on September 27, 1966 (CT 418-421).

Appellant was not represented at the hearing on the Motion to Dismiss September 2, 1966, or at the scheduled pretrial conference September 6, 1966 or at subsequent hearings on its Motion to Vacate Dismissal and on its Motion to Vacate Withdrawal of Counsel held September 20, 1966 and September 26, 1966 because of its inability to secure new local counsel as required by Rule 1(e) of the District Court local rules and because of the lack of finances to pay for travel expenses of its counsel from his office in San Francisco to Honolulu and return (CT 365-370).

Appellant filed his Notice of Appeal from the Judgment of Dismissal on October 12, 1966 (CT 425).

B. Questions Involved

1. Did the appellant through Preston Low, its president, wilfully fail to appear for the taking of his duly noticed deposition?

2. Did the appellant fail to prosecute this action?

3. May an attorney of record withdraw as such attorney without notice and without cause where the effect is to leave a party without representation?

C. Specification of Errors

1. The District Court erred in dismissing this action on

the ground of the wilful failure of appellant to appear for deposition.

2. The District Court erred in dismissing this action for want of prosecution.

3. The District Court erred in denying appellant's Motion to Vacate and Motion for Rehearing.

4. The District Court erred in approving Withdrawal of Counsel.

5. The District Court erred in denying appellant's Motion to Vacate Withdrawal of Counsel.

ARGUMENT

I. THE DISTRICT COURT ERRED IN DISMISSING THIS ACTION ON THE GROUND OF THE WILFUL FAILURE OF APPELLANT TO APPEAR FOR DEPOSITION.

The record discloses that the appellant's president, Preston Low, resides in Menlo Park, California, and was in the offices of appellant's local counsel, Alvin Shim, in Honolulu on June 20, 1966 at which time Mr. Shim advised him of appellees' notice to take his deposition on June 28, 1966. Mr. Low advised Mr. Shim that he was on his way to Hong Kong on personal business and would not return until the following month, and requested Mr. Shim to obtain a continuance of the deposition until his return. Mr. Shim then wrote a letter to each of the appellees' counsel of record requesting a three-months' continuance on the ground that his firm was withdrawing as local counsel of record (CT 351-352, Exhibit A). Appellees made no response to this letter, although requested to do so. Appellant accordingly assumed the continuance had been granted (CT 365). The record further discloses that Mr. Low was willing to have his deposition taken by the appellees at any time in San Francisco or Honolulu, providing that he be given at least two-weeks' notice so as to arrange his business schedule (CT 365-367).

Under the foregoing circumstances, appellant submits that there was no failure to attend this deposition since Mr. Low had a legitimate reason for not being present, his local counsel had requested such continuance, and appellees by their failure to

reply to this request impliedly consented thereto. In any event, if there were a failure to attend the deposition, the failure was not wilful. Mr. Low had indicated to his local attorney that he would be willing to have his deposition taken at any time upon two-weeks' notice.

Appellees in their Statement of Reasons and Citation of Authorities in support of their Motion to Dismiss under Rule 37(d) stated that appellant's only excuse for not appearing at the deposition was that he needed time to secure a local attorney, and that from the record he had been informed of the need for retaining a new local attorney on March 10, 1966, referring to the Memorandum in Support of Withdrawal of Counsels filed June 24, 1966 (CT 353-355, 344-346). It is to be noted that the Memorandum referred to by Yukio Naito, Alvin T. Shim and Eichi Oki, appellant's local counsel, was not in affidavit form, and accordingly could not properly be considered by the Court in connection with this Motion. Even if considered, the Memorandum merely stated that Mr. Naito informed Mr. Tibbits of his withdrawal as counsel. It did not state that Messrs. Naito, Shim and Oki were all withdrawing as counsel, but only that Mr. Naito was going to withdraw. Mr. Tibbits in his affidavit stated that he understood that Mr. Shim would remain on in the capacity of appellant's local counsel, and that it was not until about June 21, 1966 or one week before the scheduled deposition that appellant's counsel had notice that Mr. Shim also was going to withdraw as local counsel. Even then he had no notice Mr. Oki would also withdraw. (CT 368-370).

Appellant should not be penalized for the failure of its local attorney to advise appellees' counsel of Mr. Low's business engagement which prevented him from having his deposition taken at the scheduled time and his willingness to have his deposition taken the following month, or at any time upon two-weeks' notice.

Maresco v. Lambert (ED NY 1941) 2 FRD 163.

In Maresco, a motion was made to strike the complaint and dismiss the action on the ground that the plaintiff had failed to submit to an examination pursuant to Rule 26 of the Federal Rules of Civil Procedure. It appeared that the plaintiff failed to attend the deposition due to his changing attorneys and a misunderstanding on the part of the new associate attorney. Judge Moscowitz in denying the motion stated:

> "The excuse is rather lame, but the client should not suffer in this instance because of the lawyer's fault."

II. THE DISTRICT COURT ERRED IN DISMISSING THIS ACTION FOR WANT OF PROSECUTION.

The Complaint in this action was filed November 30, 1961. Appellees then moved to dismiss the Complaint which motion was granted in part and denied in part. Appellant then served extensive interrogatories on Appellees which in due course were answered. An Order was entered dismissing the Complaint with leave to amend. Appellant then filed its First Amended Complaint on November 13, 1964 and Appellees filed their Answers thereto (CT 460-464). Appellant requested a trial date on June 10, 1966, and the action

was set for pretrial September 6, 1966. Appellant prepared and filed a pretrial memorandum and was ready to go to trial except that it was unable to secure the assistance of new local counsel as required by local rule 1(e) (CT 360-370).

From the date of withdrawal of Messrs. Naito, Shim and Oki on June 22, 1966 to the date of the hearing on Appellees' Motion to Dismiss September 2, 1966, Appellant made every effort to secure new local counsel. However, due to the complexities of an anti-trust action, the financial insolvency of Appellant which necessitated payment of new counsel on a contingency fee basis only, and the distance separating Appellant whose local offices had been closed in Honolulu and moved to Menlo Park, California, and Appellant's attorney whose office was in San Francisco, California, Appellant had been unable to secure new counsel by September 2, 1966. It had consulted with Walter Chuck, Esq. of Honolulu and was consulting with another local firm when the action was dismissed (CT 365-370).

Under these circumstances it is submitted Appellant was not dilatory in prosecuting its action, and it was an abuse of the District Court's discretion to have entered a dismissal on this ground.

Link v. Wabash R. Co., 370 US 626.

A) Failure to appear or to submit affidavits and other papers in opposition to Appellees' Motion to Dismiss at the hearing September 2, 1966 was by mistake.

From the Affidavit of its counsel Arthur H. Tibbits it is clear that counsel was not aware that Appellees' Motion to Dismiss was to be heard on September 2, 1966 but instead on September 6, 1966. This was due to the fact that under local District of Hawaii rules the time and place of the hearing on the Motion were not set forth in the first page as is done in the Northern District of California, but at the end of the Motion on the bottom page. This mistake is excusable, and the District Court was empowered by Federal Rules of Civil Procedure Rule 60(b) to relieve it of this mistake. Appellant availed itself of this corrective remedy in its Motion to Vacate Dismissal with Prejudice (CT 375-387).

Link v. Wabash R. Co. supra

Under Rule 60(b) of the Federal Rules of Civil Procedure, the District Court had the power to relieve a party or his legal representative from a final judgment or order or proceeding for mistake, inadvertency, surprise, or excusable neglect.

In the following Federal decisions, relief was granted under this Rule 60(b) for mistake, inadvertence, surprise or excusable neglect:

Weller v. Socony Vacuum Oil Co. of New York
(SD NY 1941) 5 FR Serv 60.b.33, Case 3,2FRD 158

(a judgment of dismissal where the failure to file a bill of particulars was due to the oversight or inadvertence of the clerk of plaintiff's attorney)

Soriano v. American Liberty Steamship Corp.
(ED Pa 1952) 17 FR Serv 60.b.22, Case 1, 13 FRD 455

(a judgment of dismissal for want of prosecution occasioned by the inadvertence of plaintiff's counsel)

Wolfsohn v. Raab
(ED Pa 1951) 15 FR Serv 60b.24, Case 2, 11 FRD 254

(the defendant's attorneys' excusable miscalculation of time by one day)

Woods v. Severson
(D Neb 1948) 12 FR Serv 60b.24, Case 1, 9 FRD 84

(defendant's attempt to act as her own attorney and to her unfamiliarity with the formal requirements of an answer)

B) Appellant's failure to obtain new local counsel in conformity with local Rule I(e) within the time allotted did not constitute want of prosecution.

Rule I(e) of the United States District Court for the District of Hawaii became effective March 21, 1955, reads as follows:

"(e) Permission to Participate in a Particular Case.

Any member in good standing of the bar of any court of the United States or of the highest court of any state, but not an active member of the bar of this court, may, upon oral or written motion, be granted permission to participate in the conduct of a particular case in this court, but such motion shall be allowed only if such attorney associates with him an active member of the bar of this court, who shall at all times meaningfully participate in the preparation and trial of the case."

When Appellant instituted its action it was represented by local counsel, Louis B. Blissard. Subsequently on November 4, 1964 the firm of Shim and Naito was substituted for Blissard with the consent of Appellant (CT 260-261). On June 24, 1966, the firm

Shim & Naito obtained an ex parte order of the District Court without notice to it and without valid excuse or reason permitting it to withdraw from the action as Appellant's local counsel (CT 343). The order was not supported by affidavit but by an unsworn Memorandum (CT 344-346). Appellant never consented to this withdrawal, but made every effort to obtain other local counsel which proved unsuccessful up to the time of the dismissal of the action, and even at this time it was continuing its efforts to obtain new local counsel. After the action was dismissed for want of prosecution, Appellant moved the Court to vacate withdrawal of local counsel and reinstate the firm of Shim & Naito, which motion was denied. Had this motion been granted Appellant would have had local counsel and would have been able to proceed with its action. It submits that these facts do not constitute want of prosecution on its part.

Woodham v. American Cystoscope Company of Pelham, N.Y., CA5, 1964, 335 F2d 551.

III. THE DISTRICT COURT ERRED IN DENYING APPELLANT'S MOTION TO VACATE WITHDRAWAL OF COUNSEL AND REINSTATE COUNSEL OF RECORD.

Following dismissal of this action Appellant moved to Vacate Withdrawal of Counsel and Reinstate Counsel of Record on the ground that such withdrawal had left it without local representation as required by Rule I(e) supra.

An attorney cannot unilaterally withdraw from representing a party to a pending action even if the Court approves, if the party is left thereby without representation [or, as in this case, local representation, as required by Rule 1(e)].

The proper and usual procedure is to file a Substitution of Attorneys consented to by both the old and new attorneys, and by the client, but, if the consent of the client is not obtainable, by a Court Order upon a written application or Motion therefor under Rules 6 and 7 of F.R.C.P. with notice to the client and for good cause shown. Messrs. Shim, Naito and Oki did not obtain appellant's prior consent to a Substitution of Attorneys. They made no written Motion supported by affidavit with notice to appellant as provided by Rule 6(d). All they did was to file a paper entitled "Withdrawal of Counsel" together with an unsworn Memorandum of Withdrawal of Counsel, which the Court approved.

This unilateral procedure is not in conformity with the F.R.C.P., and the Court below was in error, first in approving the Withdrawal of Counsel and second in not granting appellant's Motion to Vacate such withdrawal, particularly when the effect of such withdrawal was to leave the appellant without representation, i.e. in this case local representation.

Laskowitz vs. Shellenberger (S.D. Calif. 1952)
107 F.Supp 397

7 Corpus Juris Secundum "Attorney and Client"
§§120 and 121 and cases cited.

The Laskowitz case is directly in point. Here the Court refused to permit the withdrawal of attorneys for a corporate defendant where such withdrawal would have left the corporation without representation. The Court in its opinion stated in part:

> "Said defendant consents to the withdrawal by a document bearing its seal filed with the Court.

> The Court does not consent to the withdrawal of attorneys. Approval would leave a corporate defendant without representation. Even if a defendant assumes to represent himself, he must either enter his first appearance in the case in propria persona or be substituted for whoever appeared as his attorney. Defendant appropriately does not offer to do this because, being a corporation, it is without capacity to either represent others or itself.
>
> * * * * * * *
>
> In any event a withdrawal of attorneys is not the proper course. A substitution of attorneys approved by the Court is the method of changing representation. The purported withdrawal of attorneys is disallowed."

CONCLUSION

Appellant urges this Court to reverse the judgment dismissing the action below on the ground that the Order permitting its local counsel to withdraw on the threshold of the trial was improper, leaving it without local representation as required by Local Rule 1(e) and excused it from attendance at later proceedings until it had obtained new local counsel or until its former counsel had been ordered reinstated.

It is respectfully submitted, for each of the reasons herein set forth, that judgment be reversed and the action remanded for further proceedings in the District Court with instructions to reinstate appellant's local counsel of record until new counsel may be secured.

Dated at San Francisco, California, this 13th day of November, 1967.

Respectfully submitted,

Arthur H. Tibbits
Attorney for Appellant

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

Arthur H. Tibbits

CERTIFICATE OF MAILING

ARTHUR H. TIBBITS, Esquire, certifies that he is an active member of the State Bar of California and that his business address is 55 New Montgomery Street, San Francisco, California 94105; that he has served a copy of the attached Opening Brief of Appellant HONOLULU LUMBER CO., LTD. by placing a copy in an envelope addressed to the following persons at their office addresses as below:

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The envelopes were then sealed and postage fully prepaid and on November 13, 1967 were deposited in the United States mail at San Francisco, California.

Executed on November 13, 1967 at San Francisco, California.

Arthur H. Tibbits